SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-634

CHARLES L. MEYER,

Petitioner,

vs.

ROBERT C. SEAMANS, JR.,
Secretary of the Air Force,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Justices of the Supreme Court:

Petitioner, Charles L. Meyer, respectfully prays that the writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the decision of the United States District Court,

for the Northern District of Illinois, Eastern Division, dismissing the plaintiffs' complaint.

This cause was brought by plaintiff to require the Air Force Board for the correction of military records to grant him a hearing on his claim that certain officer effectiveness reports regarding his performance of his duties in the United States Air Force Reserve had not been filled out in compliance with Air Force rules and regulations and thus deprived him of substantial rights. The District Court dismissed the cause for lack of jurisdiction and the Court of Appeals affirmed.

OPINIONS BELOW.

The Opinion of the Court of Appeals is not reported and is reproduced as appendix A to this Petition. The District Court rendered no opinion, only an order indicating that the cause had been dismissed for lack of jurisdiction.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 25, 1973. No Petition for rehearing was filed. The Jurisdiction of this Court rests on 28 U.S.C. § 1254 (1).

QUESTION PRESENTED.

1. Whether the United States Courts have jurisdiction to review the failure and refusal of the Air Force to follow its own rules and regulations in regard to correction of records upon which promotions are based by law on the due process and equal protection clauses of the United States Constitution.

STATEMENT OF THE CASE.

On January 11, 1972, the District Court entered the following order:

"It is hereby Adjudged, Decreed and Ordered That:

1. The order of this court of November 30, 1971, be vacated;
2. That the filing of the amended complaint of the plaintiff be allowed;
3. That the amended complaint is hereby dismissed as not properly invoking the jurisdiction of this court. This does not constitute a ruling on the merits. It is so ordered."

The Court of Appeals based its affirmance upon Air Force regulation 31-3, Section B, which states that the Board may deny an application if it determines that insufficient evidence has been presented, and that when an

application is denied without a hearing, written findings and decisions are not required. The Court held that the allegations in the complaint that the officer effectiveness reports prepared on plaintiff contained material misstatements as well as pertinent omissions "do not give rise to judicial review."

The Plaintiff alleged in his amended complaint that there were several very serious defects in the officer effectiveness reports which did not comply with the written directives of the United States Air Force. Those decisions, as set forth in the amended complaint are as follows:

A. The recording officer purported to report on and evaluate duties performed by plaintiff when he had no knowledge of plaintiff's performance therein, and failed and refused to obtain an evaluation of plaintiff's performance from plaintiff's superiors therein;

B. The reporting officer based evaluations of plaintiff upon information which was untrue, without determining the truth of said material;

C. The reporting officer failed to set forth facts in support of several subjective evaluations of plaintiff in direct violation of the rules and regulations of the United States Air Force;

D. The reporting officer deleted from said reports evaluation of additional duties to which plaintiff was assigned and which were performed by him.

REASONS FOR GRANTING THE WRIT.

Both the District Court and the Court of Appeals held that the Courts are not charged with correcting the performance records of those in military service, and to review promotions of military personnel. These holdings completely misconstrue the gist of plaintiff's complaint. Plaintiff is not asking that the Court substitute themselves for the administrative procedures established by the military for review of performance records on promotion. What plaintiff does ask, and what he is clearly entitled to have, is a fair and full administrative hearing within the military establishment, in accordance with the rules and regulations established by the military itself. If the decision of the Courts below are allowed to stand, it will become impossible for a member of the military to obtain review of the refusal of the military to treat him fairly in regard to matters of performance ratings and promotions. The denial of a hearing and dispensing with requirement that reasons be given for a decision are fundamental denials of due process. It is well established that the federal courts may review actions by military authorities which violate their own established regulations. *Hammond* v. *Lenfest,* 398 F. 2d 705, 715 (2d Cir.) Where the military's own regulations have been ignored, "it is the duty of the judiciary to inquire into an allegedly wrongful and detrimental refusal to grant deserved relief" by the military administrative system. *Van Bourg* v. *Nitze,* 388 F. 2d 557, 563 (D.C. Cir., 1967) As was said in *Smith* v. *Resor,* 406 F. 2d 141, 145, 146 (2d Cir., 1969):

> "Although the courts have declined to review the merits of decisions made within the area of discre-

> tion delegated to administrative agencies they have insisted that where the agencies have laid down their own procedures and regulations, these procedures and regulations cannot be ignored by the agencies themselves even where discretionary decisions are involved.
>
> • • •
>
> "This clear precept, that an agency must follow the regulations it promulgates, has been applied to the Army as well."

These cases clearly show that the Courts do have the jurisdiction and the obligation to require the Air Force to follow its regulations in regard to officer effectiveness reports prepared in evaluating plaintiff's performance as an officer and the review of these reports. If these reports were made improperly, then the information upon which plaintiff was denied promotion was faulty. Plaintiff has the right to have the Courts review the manner in which the Air Force conducted a review of plaintiff's request for correction. The complaint in this matter shows that that review was carried out in this matter contrary to the requirements of due process. He was neither given an opportunity to be heard nor reasons for the refusal to correct these reports.

The statements of Justice Douglas of this Court should be borne in mind in situations such as this:

> ". . . it is the function of the courts to make sure, in cases properly coming before them, that the men and women constituting our Armed Forces are treated as honored members of society whose rights do not turn on the charity of a military commander. . .
>
> "A member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity

of a commander but as written in the Constitution and engrossed by Congress in our Public Laws." *Winter* v. *U. S.*, 89 S.Ct. 57, 21 L. Ed. 2d 80 (1968)

To deny plaintiff his day in court and to allow the Air Force to ignore its own rules and regulations in dealing with him clearly deprives him of his rights to due process and equal protection. The refusal of the Air Force to allow plaintiff a hearing on his allegations that specific rules and regulations were not followed is a full denial of those due process rights. The federal courts sit to protect the rights of citizens granted by the constitution, and any other holding seeking to evade this obligation emasculates those constitutional protections. Neither of the lower courts made any inquiry into the matters alleged in the complaint and amended complaint herein. The amended complaint shows that the Air Force failed to follow its own specific rules and regulations, and he is entitled to a hearing on those claims. To deny him this hearing makes military personnel second class citizens.

CONCLUSION.

It is settled beyond question that the federal courts have jurisdiction to review the failure of the military to follow its own rules and regulations in dealing with its personnel. Plaintiff has clearly and plainly alleged that the Air Force failed to follow its own rules and regulations in passing him over for promotion, both in the manner in which the Officer Effectiveness Reports were made out in the first instance, and in the manner in which

his request for review of his records was handled. He is entitled to prove these allegations, and upon such proof, to an order directing that the Air Force follow its own rules and regulations. This Court should grant Certiorari in this matter to reaffirm that military personnel are entitled to the same constitutional protections as every other citizen in this country.

Respectfully submitted,

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APPENDIX "A"

Opinion of the U. S. Court of Appeals

June 25, 1973

Before

Hon. Luther M. Swygert, Chief Judge
Hon. Latham Castle, Senior Circuit Judge
Hon. Stanley N. Barnes, Senior Circuit Judge[1]

ORDER

Charles L. Meyer brought this action against the Secretary of the Air Force to obtain relief from an administrative decision of the Secretary allegedly made in violation of Air Force regulations. The trial judge dismissed the complaint for want of jurisdiction and Meyer took this appeal.

Meyer alleged in his complaint that certain officer evaluation reports [OERs] assessing his performance as an officer had been filled out by his superior officers in a manner which violated several Air Force regulations pertaining to completion of OER forms. He further alleged that review of his OERs within the Air Force Administration was faulty, the Air Force Board for the Correction of Military Records having:

> . . . [N]ot allowed plaintiff a hearing on his said request for corrections of his records . . . not granted him an opportunity to rebut the said information in the OERs pertaining to him, and . . . given no reasons for the actions of the United States Air Force.

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[1] The Honorable Stanley N. Barnes, Senior Judge of the Court of Appeals for the Ninth Circuit, is sitting by designation.

(Opinion of the U. S. Court of Appeals)

As is apparent from his brief on appeal, Meyer is not challenging the constitutionality of Air Force review procedures; his claim, instead, is bottomed on his assertion that the above omissions of the Air Force Board violated regulations in force at the time. We reject this view.

Air Force Regulation 31-3, Section B, which deals with applications for correction of records, states at paragraph 8:

a. *Review.* Each application and the available military or naval records pertinent to the corrective action requested will be reviewed to determine whether to authorize a hearing, recommend that the records be corrected without a hearing, or to deny the application without a hearing.

• • •

b. *Denial of Application.* The Board may deny an application if it determines that insufficient relevant evidence has been presented to demonstrate the existence of probable material error or injustice, that the applicant has not exhausted other effective administrative or legal remedies available to him, that effective relief cannot be granted, or that the applicant did not file his application within three years after he discovered the alleged error or injustice and insufficient evidence has been presented to warrant a finding that it would be in the interest of justice to excuse the failure to file within the prescribed three years.

• • •

c. *Written Findings.* When an application is denied without a hearing, written findings and decisions are not required.

The Board notified Meyer on April 5, 1971, that the evidence submitted by him failed to "establish a showing of probable error or injustice" in his case, and denied his application for correction. Meyer thus had no right under the regulations to a statement of reasons, much less a hearing before the Board. The complaint alleges no error on the part of the Board,[2] and we do not think it proper to review de novo its determination under AFR 31-3 when it has acted entirely in accord with applicable law.

Essentially, the plaintiff alleges that the OERs contained material misstatements as well as pertinent omissions—in short, that mistakes were made by the reporting officer. Such allegations do not give rise to judicial review. The courts are not charged with correcting the performance records of those in the military service.

The dismissal is affirmed.

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[2] Meyer does not allege that the Board was arbitrary or capricious in its finding that his submission failed to present a case of probable error. Indeed, he does not even allege that the supposed mistakes in his OER were the proximate cause of his being passed over for promotion. He states only this:

> Plaintiff has been twice passed over for promotion to Major, and under the rules and regulations of the United States Air Force, was separated from said United States Air Force as of August 25, 1971.
>
> The said pass-overs for promotion were the direct and proximate result of several Company Grade Officer Effectiveness Reports (Hereinafter referred to as OERs) which were prepared and submitted by plaintiff's superiors.
>
> These said OERs were improperly prepared and submitted and did not comply with the written directives of the United States Air Force . . . .

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The petition for a writ of certiorari was not timely filed. The judgment of the court of appeals in this civil suit was entered on June 25, 1973. An application for an extension of time was received by the Court on September 22, 1973,[1] and denied by Mr. Justice Rehnquist on September 24, 1973. The 90-day period provided by 28 U.S.C. 2101(c) for petitioning in civil cases expired on September 24, 1973. The petition was filed on October 9, 1973.

The time limit specified by 28 U.S.C. 2102(c) is jurisdictional, *Toledo Co.* v. *Computing Co.*, 261 U.S. 399, 418.

[1] The application was thus untimely under this Court's Rule 34(2).

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

DOJ-1973-10